European Review of Private Law 2-2019 [429–450] © 2019 Kluwer Law International BV, The Netherlands.

Tort Law and the Regulation of Classification Societies: Between Public and Private Roles in the Maritime Industry

Jan de Bruyne*

Abstract: Classification societies provide commercial certification services in the maritime sector. In this private role, they issue a certificate attesting that a vessel is built in accordance with class rules. The services of classification societies gradually expanded to carry out certification services on behalf of flag States. In this public role, they implement and enforce international maritime safety standards. The dual role of classification societies becomes important in assessing the potential of tort law in regulating their conduct. The article argues that the risk of tort liability can be used as a starting point to increase the accuracy and reliability of class certificates due its so-called deterring effect. The deterring effect of tort law, however, can be undermined by the dual role of classification societies. Against this background, the role and functioning of classification societies might need some reconsideration.

Résumé: Les sociétés de classification fournissent des services de certification commerciale dans le secteur maritime. Dans ce rôle privé, elles émettent un certificat attestant que le navire est construit conformément aux règles de classe. Les services des sociétés de classification se sont progressivement étendus pour fournir des services de certification pour le compte des États du pavillon. Dans ce rôle public, elles mettent en œuvre et appliquent les normes internationales de sécurité maritime. La distinction entre ces fonctions publiques et privées devient importante pour évaluer le potentiel du droit de la responsabilité délictuelle dans la réglementation du comportement des sociétés de classification. L'article avance que le droit de la responsabilité délictuelle peut être utilisé pour accroître la précision et la fiabilité des certificats de classe. L'effet 'dissuasif' du droit de la responsabilité délictuelle est toutefois compromis/affaibli par le double rôle des sociétés de classification. Le rôle et la position des sociétés de classification pourraient donc nécessiter une réévaluation.

Zusammenfassung: Klassifikationsgesellschaften bieten kommerzielle Zertifizierungsdie nste im maritimen Sektor an. In dieser privaten Rolle stellen sie ein Zertifikat aus, das bescheinigt, dass ein Schiff gemäß den Klassenregeln gebaut wurde. Die Dienstleistungen von Klassifikationsgesellschaften wurden schrittweise erweitert, um Zertifizierungsdienste für Flaggenstaaten durchzuführen. In dieser öffentlichen Rolle implementieren und durchsetzen sie internationale Sicherheitsstandards für den Seeverkehr. Die Unterscheidung zwischen diesen öffentlichen und privaten Funktionen wird wichtig, um das Potenzial des Deliktsrechts bei der Regulierung des Verhaltens von Klassifikationsgesellschaften

* Post-doctoral researcher at the Ghent University Faculty of Law and Criminology and Van Calker Scholar at the Swiss Institute of Comparative Law in Lausanne. This article was prepared for the Workshop 'Regulating Private Regulators', organized by the Tilburg Institute for Private Law in May 2018. The author would like Paul Verbruggen for his valuable feedback on earlier drafts. The final version of this contribution was submitted on 23 February 2019. Email: jan.debruyne@ugent.be.

abzuschätzen. Der Artikel argumentiert, dass das Deliktsrecht genutzt werden kann, um die Genauigkeit und Zuverlässigkeit von Klassenzertifikaten zu erhöhen. Der ‚abschreckende Effekt'des Deliktsrechts wird jedoch durch die Doppelrolle der Klassifikationsgesellschaften ausgeholt. Die Rolle und Position von Klassifikationsgesellschaften sollte daher vielleicht überdenkt werden/könnte daher einer erneuten Überprüfung bedürfen.

1. Introduction

1. Third-party certifiers (further also referred to as certifiers) are independent entities that attest whether an item such as a product or service meets particular safety or technical standards.[1] They usually operate on the basis of a certification agreement, allowing the certified entity to use the awarded certificate to engage in marketing and commercial transactions with third parties (e.g. companies, consumers or both).[2] A certifier moderates informational asymmetries that distort or prevent efficient transactions by providing the public with information it would otherwise not have. This function is so important in certain markets that one could say that without certifiers 'efficient trade would often be distorted, curtailed or blocked'.[3]

2. Classification societies operate as third-party certifiers in the maritime sector offering their services on an international scale. They provide certification services to shipowners who pay classification societies for these services.[4] Examples are Lloyd's Register of Shipping, Bureau Veritas, *Registro Italiano Navale* (RINA), American Bureau of Shipping (ABS) or DNV GL.[5] Classification societies issue a certificate of class attesting that a vessel is built in accordance with 'class rules'. Those rules are developed by classification societies themselves and contain requirements on the way the hull and the vessel's structure have to be

1 American National Standards Institute, 'U.S. Conformity Assessment System: 3rd Party Conformity Assessment', www.standardsportal.org/usa_en/conformity_assessment/3party_conformity_assessment.aspx#Accreditation.

2 P. Verbruggen, 'Aansprakelijkheid van certificatie-instellingen als private toezichthouder', 30. *NTBR (*Nederlands Tijdschrift voor Burgerlijk Recht) 2013, p (329) at 329–330.

3 J. Barnett, 'Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?', 37. *Journal of Corporation Law* 2012, p (475) at 476. See more in general: G.A. Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism', 84. *The Quarterly Journal of Economics* 1970, p 488.

4 M.A. Miller, 'Liability of Classification Societies from the perspective of United States Law', 22. *Tul. Mar. L. J.* (*Tulane Maritime Law Journal)* 1997, p (75) at 77. See for more information on classification societies: F. Goebel, *Classification Societies: Competition and Regulation of Maritime Information Intermediaries* (Hamburg: LIT Verlag Münster 2018), p 480.

5 International Association of Classification Societies, 'Classification Societies: What, Why and How?', *IACS Publications* 2011, p 5; A. Antapassis, 'Liability of classification societies', 11. *EJCL (Electronic Journal of Comparative Law)* 2007, p (1) at 3–5.

constructed and maintained.[6] The certificate is issued based on a contract between the classification society and the shipowner or the shipyard. This is referred to as the 'private function' of classification societies.[7] Important sectors of and actors in the maritime industry rely on this certificate as an assurance that the classed vessel is likely to be reasonably suited for its intended use.[8] As well as the shipowner and purchasers of vessels, maritime insurers,[9] cargo-owners[10] and charterers[11] use certificates of class prior to providing financial coverage or hiring the vessel. A certificate allows them to make a reasonable assumption as to the condition of a ship and the risks it represents without having to check the vessel themselves.[12]

3. Classification societies in their private function perform a vital role with regard to the insurability and marketability of vessels.[13] At the same time, the function of classification societies gradually expanded to cover public tasks as well. Flag States have a duty under international law to take appropriate measures for vessels flying their flag to ensure safety at sea.[14] However, flag States often delegate executive powers to classification societies as these bodies have more technical knowledge in inspecting and certifying vessels. This is referred to as

---

6 N. Lagoni, *The Liability of Classification Societies* (Berlin: Springer 2007), pp 20–21.

7 *Ibid.*, pp 43–46.

8 M.A. Miller, 22. *Tul. Mar. L. J.* 1997, pp 77 & 82–88.

9 Hull and machinery as well as protection and indemnity (P&I) insurers use class certificates to provide insurance coverage (M.A. Miller, 22. *Tul. Mar. L. J.* 1997, p 82)

10 Cargo owners rely on classification societies as 'independent appraisers of a vessel's seaworthiness' (M.A. Miller, 22. *Tul. Mar. L.J.* 1997, p 85) to contract with the shipowner for the transport of goods. As a consequence, 'cargo owners do not need to check each individual vessel's classification status because the vessel, in all likelihood, will not be in service if it is not classified' (M.A. Miller, 22. *Tul. Mar. L.J.* 1997, p 86).

11 Before deciding to use the vessel, charter parties often require that the shipowner or the classification society in which the vessel is registered confirms that it is maintained in class (M.A. Miller, 22. *Tul. Mar. L. J.* 1997, p 85; S.J. Doehring, 'Chartering of Vessels for Tidelands Operations', 32. *Tul. L. Rev. (Tulane Law Review)* 1958, p (243) at 246).

12 See in general: D.L. O'Brien, 'The potential liability of classification societies to marine insurers under United States law', 7. *U. S. F. Mar. L. J.* (*University of San Francisco Maritime Law Journal)* 1995, p (403) at 404–405; H. Honka, 'The classification system and its problems with special reference to the liability of classification societies', 19. *Tul. Mar. L. J.* 1994, p (1) at 3–5; N. Lagoni, *Classification Societies*, pp 11–26.

13 J.L. Pulido Begines, 'The EU Law on Classification Societies: Scope and Liability Issues', 36. *J. Mar. L. & Com. (Journal of Maritime Law and Commerce)* 2005, p (487) at 487–488.

14 Art. 94.3. United Nations Convention on the Law of the Sea 1982 ('UNCLOS'), 1833 UNTS 3. The International Convention of Safety of Life at Sea of 1974 ('SOLAS'), for example, requires flag States to ensure that their vessels comply with the minimum safety standards in construction, equipment and operation (International Maritime Organization, International Convention for the Safety of Life at Sea 1974, 1184 UNTS 278).

statutory certification and implies that classification societies have a 'public function' as well.[15] Whereas private commercial classification activities can be voluntary, public statutory certification is compulsory.[16] Acting as 'Recognized Organizations' (ROs), classification societies then fulfil a public role in implementing and enforcing international maritime safety standards. These standards demand certification, making it mandatory for shipowners or shipyards to apply for classification at an RO.[17]

4. Class certificates are thus widely relied upon by several actors in the maritime industry and by flag States. Parties using those certificates need to be sure that they are accurate and reliable. A classification society has to be trustworthy and apply the appropriate level of care in performing its functions for the certification mechanism to work. However, several maritime disasters such as the Erika[18] or the Prestige[19] illustrate that this is not always the case. Third parties might incur losses or suffer injuries, despite the issuance of a class certificate attesting that the vessel complied with the applicable norms. Against this background, the question arises which mechanisms could increase the accuracy and reliability of certificates.[20] The article will examine what role tort law can play in that regard, and especially whether it can be used as 'deterring' mechanism (part 2). I will then assess to which extent the dual role of classification societies reduces the deterring effect of tort law (part 3). A last part summarizes the main findings (part 4).

---

15 A. Khee-Jin Tan, *Vessel-Source Marine Pollution: the Law and Politics of International Regulation* (Cambridge: Cambridge University Press 2006), p 44.

16 J.L. Pulido Begines, 36. *J. Mar. L. & Com.* 2005, p 488.

17 J.L. Pulido Begines, 36. *J. Mar. L. & Com.* 2005, pp 488–490; N. Lagoni, *Classification Societies*, pp 50–53; A. Antapassis, 11. *EJCL* 2007, pp 13–14.

18 The sinking of the Erika in 1999 caused a huge oil pollution of the French shoreline. See J.C.P. Goldberg, 'Twentieth-Century Tort Theory', 91. *Geo. L.J.(Georgetown Law Journal)* 2003, p (513) at 545.

19 The case of the Prestige dealt with a vessel that began to leak oil about 50 kilometres from the Galician coast. The ship's request for a secure shelter and safe harbour to pump off the cargo of oil was refused by the Spanish and Portuguese authorities. Arguing that the Prestige's draught was too large to enter into the port of refuge, the vessel was towed towards the Atlantic Sea. Rough sea conditions caused it to break. A total of 64.000 tons of oil escaped from the vessel causing an enormous environmental pollution (E. Galiano, 'In the Wake of the PRESTIGE Disaster: Is an Earlier Phase-out of Single-Hulled Oil Tankers the Answer', 28. *Tul. Mar. L. J.* 2004, p (113) at 114).

20 See for an extensive discussion: J. De Bruyne, *Third-Party Certifiers – An Inquiry into their Obligations and Liability in Search of Legal Mechanisms to Increase the Accuracy and Reliability of Certification*, Doctoral Dissertation, Ghent University, Faculty of Law and Criminology, July 2018, p 452.

2. The Deterring Effect of Tort Law

5. There are several views on the role of tort law.[21] In addition to corrective or distributive justice,[22] law and economics scholars understand tort law as an instrument aimed largely at the goal of deterrence.[23] The purpose of damage payments in tort law is to provide incentives for potential injurers to take efficient cost-justified precautions to avoid causing the accident.[24] An individual or entity makes the decision about whether or how to engage in a given activity by weighing the costs and benefits of the particular activity. The risk of liability and actual imposition of damages awards may lead parties to take into account externalities[25] when they decide whether and how to act.[26] The fact that someone can be held liable *ex post* can thus provide the necessary incentives *ex ante* to act in such a way to prevent liability.[27] Tort law aims to promote overall social welfare by efficiently deterring and reducing accidents in the future.[28] Law and economics scholars argue that

---

21 G.T. Schwartz, 'Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice', 75. *Tex. L. Rev. (Texas Law Review)* 1997, p 1801.

22 Corrective justice is the idea that tort liability rectifies the injuries inflicted by one person to another one (J. Coleman, 'Moral Theories of Torts: Their Scope and Limits: Part I', 1. *Law and Phil (Law and Philosophy)* 1982, p 371; E.J. Weinrib, 'Corrective Justice in a Nutshell', 52. *University of Toronto L. J. (University of Toronto Law Journal)* 2002, p 349). Tort law can also be seen as a matter of distributive justice. It then deals with the fair apportionment of the burdens and benefits of risky activities or resources between members of the society or a community (G.C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents', 74. *S. Cal. L. Rev. (Southern California Law Review)* 2000, p (193) at 200).

23 See for example G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press 1970), p 340; R.A. Posner, 'A Theory of Negligence', 1. *J. Legal Stud. (Journal of Legal Studies)* 1972, p 29.

24 P.H. Rubin, 'Law and Economics', in D.R. Henderson (ed.), *The Concise Encyclopedie Economics*, Liberty Fund, 2008, www.econlib.org/library/Enc/LawandEconomics.html; M.G. Faure, J.A. Loonstra, N.J. Philipsen & W.H. van Boom, 'Naar een Kostenoptimalisatie van de letselschaderegeling: een verkenning', 21. *AVS* (*Aansprakelijkheid, Verzekering & Schade)* 2011, online PDF version Kluwer Navigator, p (1) at 3–4.

25 An externality, either positive or negative, is a term used in economics to describe a cost or benefit of a transaction incurred or received by other members of the society but not taken into account by the parties to the transaction. This means that parties other than the primary participants in the transaction (i.e. producers and consumers) can be affected by it (e.g. pollution). Tort litigation tries to shift the cost of negative externalities to entities creating them (R. Lipsey & A. Chrystal, *Economics* (Oxford: Oxford University Press 2015), p 312).

26 J.C.P. Goldberg, 91. *Geo. L.J.* 2003, p (513) at 545.

27 M.G. Faure & T. Hartlief, *Nieuwe risico's en vragen van aansprakelijkheid en verzekering* (Deventer: Kluwer 2002), p 19; I. Giesen, 'Regulating Regulators through Liability – The Case for Applying Normal Tort Rules to Supervisors', 2. *UTL* (*Utrecht Law Review)* 2006, p (8) at 14–15 with further references.

28 J.C.P. Goldberg, 91. *Geo. L.J.* 2003, p 544; G. Calabresi, *The Costs of Accidents*, pp 24 & 26; M.G. Faure, 'Calabresi and Behavioural Tort Law and Economics', 1. *ELR (Erasmus Law Review)* 2008, p (75) at 78–79; D. Rosenberg, 'The Judicial Posner on Negligence Versus Strict Liability: Indiana

injurers will adopt cost-justified safety measures if the system holds them liable for the injury costs they generate.[29] The risk of having to bear financial burdens due to liability could serve as an incentive for potential tortfeasors to avoid injury-causing activities or at least to provide them with greater regard for safety.[30] If tort law is working correctly, the threat of civil liability will cause actors to take all and only those precautions that cost less than the harm that is expected to result if those precautions are not taken.[31] Based on this reasoning, classification societies will take into account – 'internalize' – the risk of civil liability when issuing their certificates. This in turn will induce them to act more carefully, which could increase the accuracy and reliability of certificates.[32]

6. The assumptions upon which the traditional law and economics literature is based have, however, been challenged in academia. Behavioural law and economics scholars question the underlying rational choice assumptions and endeavour to render economic analysis more realistic by using psychological insights.[33] Several (empirical) studies even show that tort law does not always have the expected deterring influence on someone's behaviour.[34] That being said, there still are several reasons why I decided to start from the classical law and economics approach in this article.

Harbor Belt Railroad Co. v. Am. Cyanamid Co', 120. *Harv. L. Rev. (Harvard Law Review)* 2007, p 1210 at 1212 (citing *Ind. Harbor Belt R.R. Co.* v. *Am. Cyanamid Co.*, 662 F. Supp. 635, pp 1181–1182 (N.D. Ill. 1987)); A.D. Miller & R. Perry, 'The Reasonable Person', 82. *N.Y.U. L. Rev. (NYU Law Review)* 2012, p (323) at 328.

29 S.D. Smith, 'Critics and the Crisis a Reassessment of Current Conceptions of Tort Law', 72. *Cornell L. Rev. (Cornell Law Review)* 1987, p (765) at 772 with further references in n. 28.

30 C. Brown, 'Deterrence in Tort and No-Fault: The New Zealand Experience', 73. *Cal. L. Rev. (California Law Review)* 1985, p (976) at 976–977.

31 J.C.P. Goldberg, 91. *Geo. L.J.* 2003, p 545.

32 See in this regard also P. Duffhues & W. Weterings, 'The quality of credit ratings and liability: The Dutch view', 8. *IJDG (International Journal of Disclosure and Governance)* 2011, p (339) at 352.

33 See for example K. Mathis, *European Perspectives on Behavioural Law and Economics* (SpringerLink (Online service) 2015), p 271; C. Jolls, C.R. Sunstein & R. Thaler, 'A Behavioral Approach to Law and Economics', 50. *Stan. L. Rev. (Stanford Law Review)* 1998, p 1471; Y. Halbersberg & E. Guttel, 'Behavioral Economics and Tort Law', Hebrew University of Jerusalem Legal Studies Research Paper Series No. 02-15, 1 September 2014, p 2, ssrn.com/ abstract=2496786.

34 See for example D.W. Shuman, 'Psychology of Deterrence in Tort Law', 42. *U. Kan. L. Rev. (University of Kansas Law Review)* 1993, p (115) at 165; M. Van Dam, 'Fault en no-fault. Een theoretisch en empirisch onderzoek naar de gedragseffecten van fault en no-fault bij verkeersongevallen', in W.H. van Boom, I. Giesen & A.J. Verheij (eds), *Gedrag en privaatrecht. Over gedragspresumpties en gedragseffecten bij privaatrechtelijke leerstukken* (The Hague: Boom Juridische Uitgevers 2008), pp 341–366; J.W. Cardi, R.D. Penfield & A.H. Yoon, 'Does Tort Law Deter Individuals? A Behavioral Science Study', 9. *J. Empirical Legal Stud. (Journal of Empirical Legal Studies)* 2012, p 567.

7. Classification societies, for instance, are rational actors and attempts are even taken in legislation to reduce irrational human behaviour during the certification process (e.g. adoption of provisions aiming to ensure a classification society's independence and increase the accuracy and reliability of certificates[35]). The threat of liability and its influence to shape a particular behaviour might thus play a more important role in the context of classification societies than, for example, in traffic-related matters. The incentive provided by tort law will be lower in traffic as people are inclined to prevent accidents by the wish to protect their own safety rather than by the risk to be sued in court. This is an instinctive reaction and not 'calculated negligence'.[36] Classification societies by contrast are professional entities operating on a commercial basis and can be presumed to act more rationally. As profit maximizers, they can weigh the costs and benefits of their actions carefully and take a decision to prevent liability.[37]

8. More importantly, Zabinski & Black find evidence 'that reduced risk of med (ical) mal(practice) litigation, due to state adoption of damage caps, leads to higher rates of preventable adverse patient safety events in hospitals [...] Our study is the first, either for medical malpractice or indeed, in any area of personal injury liability, to find strong evidence consistent with classic tort law deterrence theory – liability for harm induces greater care'.[38] Professor Schwartz concludes that 'tort law, while not as effective as economic models suggest, may still be somewhat successful in achieving its stated deterrence goals'. More specifically, '[t]he information suggests that the strong form of the deterrence argument is in error. Yet it provides support for that argument in its moderate form: sector-by-sector, tort law provides something significant by way of deterrence'.[39] Handbooks and academic articles also acknowledge the deterring function[40] or consequences[41] of tort law. Judges rely on law and economics

35 See in this regard J. De Bruyne & C. Vanleenhove, 'An EU Perspective on the Liability of Classification Societies. Selected Current Issues and Private International Law Concerns', 20. *JIML (Journal of International Maritime Law)* 2014, p 103.

36 C. Witting, *Streets on Tort* (Oxford: Oxford University Press 2015), p 18.

37 Cf. I. Giesen, 2. *UTL* 2006, p 16; I. Giesen, *Toezicht en aansprakelijkheid: een rechtsvergelijkend onderzoek naar de rechtvaardiging voor de aansprakelijkheid uit onrechtmatige daad van toezichthouders ten opzichte van derden* (Deventer: Kluwer 2005), pp 148–149.

38 Z. Zabinski & B.S. Black, 'The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform', Northwestern Law & Econ Research Paper No. 13-09, 15 February 2015, p 19, papers.ssrn.com/sol3/papers.cfm?abstract_id=2161362.

39 G.T. Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter', 42. *UCLA L. Rev. (UCLA Law Revi*ew) 1994, p (377) at 443.

40 See for example K. Horsey & E. Rackley, *Tort Law* (Oxford: Oxford University Press 2017), p 18; A. Darbellay, *Regulating Credit Rating Agencies* (Cheltenham: Edward Elgar 2013), p 226; T.C. Jr. Galligan, 'Deterrence: The Legitimate Function of the Public Tort', 58. *Wash. & Lee L. Rev. (Washington and Lee Law Review)* 2001, p (1019) at 1020–1021.

41 M. Kruithof, *Tort Law in Belgium* (Alphen aan den Rijn: Kluwer Law International 2018), p 35 concluding that '[i]n general, however, while Belgian authors recognize that liability law has this preventing *effect*, they more rarely invoke the prevention of losses as the *function* of liability law'.

considerations as well. In the *Marc Rich* case dealing with the liability of classification societies, for instance, the House of Lords concluded that the existence of a duty of care would inevitably extend to every type of survey classification societies (have to) perform. This would increase their exposure to claims in tort, thereby not only creating an 'extra layer of insurance', but also opening the door for more claims (the so-called 'floodgate' argument).[42] Professor Popper further writes that deterrence is a real and present virtue of the tort system. The actual or potential imposition of civil tort liability changes the behaviour of others. He concludes that '[a] tort case can communicate a normative message, an avoidance message, or a message affirming current practices. [footnote omitted] To deny that judicial decisions provide a valuable deterrent effect is to deny the historic role of the judiciary, not just as a matter of civil justice but as a primary and fundamental source of behavioral norms'.[43] Based on a restricted survey, he even finds empirical evidence of the deterring function of tort law.[44]

3. The Dual Role of Classification Societies and Deterring Effect of Tort Law

9. The deterring function or effect of tort law can thus be used as a mechanism to induce classification societies to issue more accurate and reliable certificates. The question, however, arises whether the dual role of classification societies could potentially undermine this effect of tort law. Finding an answer to that question is by no means straightforward and will be done by focussing on three elements. I will first examine whether the public role influences the risk that classification societies will be held in tort (part 3.1.). Secondly, I will assess to which extent classification societies can rely on immunity from jurisdiction to refute liability (part 3.2.). Finally, the influence of conflicts of interest on the accuracy and reliability of certificates is briefly analysed as well (part 3.3.).

3.1. Existing Risk of Liability for Classification Societies as Sufficient Safeguard?

10. As classification societies offer their services on an international level, they might face a high(er) risk of liability. This could induce them to issue more accurate and reliable certificates. However, the existing risk of civil liability at

42 *Marc Rich & Co. AG* v. *Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, pp 147–148.

43 A.F. Popper, 'In Defense of Deterrence', 75. *Alb. L. Rev. (Albany Law Review)* 2012, p (181) at 185.

44 A.F. Popper, 75. *Alb. L. Rev.* 2012, pp 196–197.

the inter- or supranational level (part 3.1.1.) and at the national level (part 3.1.2.) seems not (always) sufficiently high to achieve that goal.

3.1.1. The Risk of Liability at the Inter- and Supranational Level

11. There is currently no international legislation dealing with the liability of classification societies. The *Comité Maritime International* (CMI)[45] established a Joint Working Group on the Study of Issues of Classification Societies in June 1992. The Group focussed on the duties and the scope of the liability of classification societies. During the first Session, however, it was decided that issues of statutory limitation and the regulation of civil liability of classification societies would not be examined.[46]

12. The EU enacted Directive 2009/15[47] and Regulation 391/2009[48] that deal with the role, recognition and liability of ROs. Pursuant to Directive 2009/15, Member States that delegate certifying functions to ROs have to set out a working relationship between their competent administration and the classification society that acts on their behalf. This working relationship has to be regulated by a formalized written and non-discriminatory agreement or other equivalent legal arrangements. The agreement has to include provisions on an RO's financial liability when its activities cause harm for which the government has been held liable.[49]

13. Under the circumstances set out in Article 5.2(b), the administration is entitled to financial compensation from the RO to the extent that the loss, injury or death was caused by it. There are three grounds upon which ROs can be held liable towards the flag State: unlimited liability for a wilful act or omission or gross negligence; limited liability for a negligent or reckless act or omission causing personal injury or death; and limited liability for any negligent or reckless act or omission causing loss of or damage to property.[50] Several problems remain with regard to the application of the liability provisions included in the Directive. One of the main problems is the unclear phrasing and use of undefined terms such as

---

45 The CMI is a non-governmental not-for-profit international organization established in Antwerp in 1897. It aims to contribute by all appropriate means and activities to the unification of maritime law.

46 F.L. Wiswall, *Report and Panel Discussion concerning the Joint Working Group on a Study of Issues re Classification Societie*s (Antwerp: CMI Yearbook 1994), p 229.

47 Dir. 2009/15/EC of 23 April 2009 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations, eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32009L0015.

48 Reg. 391/2009 of 23 April 2009 on common rules and standards for ship inspection and survey organizations, eur-lex.europa.eu/legal-content/EN/TXT/?qid=1537956430780&uri=CELEX:32009R0391.

49 Art. 5 Dir. 2009/15.

50 Art. 5, 2, (b) (i)-(iii) Dir. 2009/15.

'reckless' and 'gross negligence'.[51] In addition, the Directive lacks the necessary standards against which reckless or gross negligent acts of ROs must be evaluated.[52] The Directive also remains silent on the civil liability of classification societies towards shipowners or third parties (private role). In sum, it remains uncertain whether classification societies face sufficient incentives to issue accurate and reliable certificates under the provisions included in the Directive. Courts thus have to rely on domestic principles of contract and tort law to determine a classification society's liability.

3.1.2. The Risk of Liability at the National Level

14. Due to the lack of effective inter- and supranational legislation, national private law is really the only source to establish liability for harm caused by classification societies. An extensive comparative analysis, however, does not fall within the scope of this article.[53] Instead, it is briefly examined whether the public role of classification societies could undermine the deterring function of tort law, and hence decrease the accuracy and reliability of certificates. To that end, I will focus on those jurisdictions where the public role of classification societies has already been explicitly addressed in case law.

15. In England, employees of the Crown (e.g. agents or public officers) or independent contractors acting on behalf of the Government can be sued in personal capacity.[54] Public servants are personally accountable for their public duties in civil actions before the courts. In other words, a servant who commits a tort can be sued by the injured party.[55] However, an action for damages against a public authority or servant for administrative wrongdoing has to fall within one of the categories of existing torts.[56] The tort of negligence is of particular importance in this regard. One of the requirements to be held liable under the tort of negligence is that the defendant has a duty of care towards the injured party. The modern approach in deciding whether a party owes a duty of care implies three

51 J.L. Pulido Begines, 36. *J. Mar. L. & Com.* 2005, p 526 with further references.

52 J.L. Pulido Begines, 36. *J. Mar. L. & Com.* 2005, p 529.

53 See for more information on the liability of classification societies: N. Lagoni, *Classification Societies*, pp 59-259; M.A. Miller, 22. *Tul. Mar. L. J.* 1997, pp 88-114; H. Honka, 19. *Tul. Mar. L. J.* 1994, pp 12-33; J. De Bruyne, 'Liability of Classification Societies - Developments in Case Law and Legislation', in M. Musi (ed.), *New challenges in maritime law: de lege lata et de lege ferenda* (Bologna: Bonomo Editore 2015), pp 223-240. J. De Bruyne, 'Liability of Classification Societies: Cases, Challenges and Future Perspectives', 45. *J. Mar. L. & Com.* 2014, p 181.

54 N. Lagoni, *Classification Societies*, p 236 referring to A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan and Company 1959), pp 193-194.

55 D. Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford: Oxford University Press 2003), pp 23-24.

56 D. Fairgrieve, *State Liability in Tort*, p 16 & pp 23-24.

elements. First, it needs to be reasonable foreseeable for the defendant that its failure to take care could cause losses to the plaintiff. Second, the relationship between both parties needs to be close enough, one of 'proximity', to create a duty of care. Third, it needs to be fair, just and reasonable to impose a duty of care upon the defendant.[57]

16. The application of these requirements in the context of classification societies is challenging. Courts in England are traditionally reluctant to accept that classification societies have a duty of care towards third parties when acting in their private role. Many of the reasons to reject the existence of a duty of care when classification societies perform their private role might also apply to deny such a duty when they act on behalf of the national administration as ROs.[58] For instance, third parties will face great obstacles to prove sufficient proximity between their economic loss and the RO's conduct/role. Besides the lack of any contractual relationship between both parties, 'the primary purpose of the classification system is [...] to enhance the safety of life and property at sea, rather than to protect the economic interests of those involved, in one role or another, in shipping'.[59] There is no duty of care to prevent economic losses as the prevention of such losses is not the aim of legislation dealing with ROs.[60] The existence of a duty of care might be even less likely as classification societies fulfil a role, which in their absence would have to be borne by flag States themselves.[61]

17. Even when assuming that there is sufficient proximity between the parties, a duty of care will only be accepted to the extent that it is fair, just and reasonable. Lord Steyn, writing for the majority in the leading *Marc Rich* case, relied on several policy considerations to conclude that it would not be fair, just and reasonable to impose a duty of care upon classification societies towards third parties. The fact that a society acts for the collective welfare is a matter that needs to be taken into account when deciding whether it would be fair to impose such a duty. Classification societies are non-profit organizations operating to promote the

---

57 N. Lagoni, *Classification Societies*, pp 236–237; V.H. Harpwood, *Modern Tort Law* (London: Routledge 2009), pp 27–30; *Caparo Industries pIc* v. *Dickman*, [1990] E.C.C., p 313.

58 V. Bermingham & C. Brennan, *Tort Law* (Oxford: Oxford University Press 2012), pp 43–107; C.E. Feehan, 'Liability of Classification Societies from the British Perspective: The Nicolas H', 22. *Tul. Mar. L. J.* 1997, pp 163–190; P. Cane, 'Classification Societies, Cargo Owners and the Basis of Tort Liability', *LMCLQ (Lloyd's Maritime and Commercial Law Quarterly)* 1995, pp 433–435; N. Lagoni, *Classification Societies*, pp 236–238.

59 *Mariola Marine Corp.* v. *Lloyd's Register of Shipping*, [1991] E.C.C. 103, p 114; *Reeman* v. *Department of Transport and Others*, [1997] 2 Lloyd's Rep. 648, pp 680–681.

60 N. Lagoni, *The Liability of Classification Societies*, Berlin, Springer, 2007, p 237; *Reeman* v. *Department of Transport*, [1994] P.N.L.R. 618, p 630.

61 *Marc Rich & Co. AG* v. *Bishop Rock Marine Co. Ltd.*, [1996] E.E.C. 120, pp 146–147; *Reeman* v. *Department of Transport*, [1994] P.N.L.R. 618, p 635 ('More broadly, one can say that the purpose of issuing certificates is the promotion of safety at sea').

collective welfare, namely the safety of lives and ships at sea.[62] However, in *Perret* v. *Collins* – a case that concerned the liability of a private body (Popular Flying Association) performing delegated statutory functions on behalf of a public authority (Civil Aviation Authority)[63] – policy considerations where discarded by the court. So if a vessel sinks and leads to casualties or injuries among staff or passengers aboard a classified vessel, the classification societies might more likely owe a duty of care.[64]

18. Another interesting case is the *Duwbak Linda* decision by the Dutch highest court (*Hoge Raad*). The vessel *Linda* was approved and certified by an RO acting on behalf of the Dutch Shipping Inspectorate. A safety certificate was issued under the *Reglement Onderzoek Schepen op de Rijn* (ROSR).[65] The ROSR contains technical and (public) safety requirements for vessels. By issuing the certificate, the society affirmed that the *Linda* complied with these technical and safety norms. A year after the certificate was awarded, the vessel capsized during its loading at a dredging construction, which was damaged as consequence thereof. The cause was a corroded bottom planking, a structural component that should have been inspected under the applicable requirements. The owner of the dredging construction filed a claim against the classification society and the Dutch Government, alleging that the certificate would not have been issued had a careful inspection been conducted according to the norms in the ROSR.[66]

19. The *Hoge Raad* affirmed the decision on appeal and rejected the claims against the classification society and the Dutch Government. The highest court held that there was no relation between the alleged violation of a statutory duty under the ROSR and the plaintiff's economic loss. Therefore, the requirement of relativity (*relativiteit*) as included in Article 6:163 of the Dutch Civil Code was not met.[67] Relativity needs to be assessed on three levels. The act has to be wrongful against the person protected by the legal norm (*persoonlijke relativiteit*). The plaintiff's loss must be of the type envisaged/protected by the legal norm as well (*zakelijke relativiteit*). The way in which the loss occurred also needs to fall within the range of the protective purpose of the violated

62 *Marc Rich & Co. AG* v. *Bishop Rock Marine Co. Limited*, [1996] E.C.C. 120, p 120 & pp 146–147.

63 *Perrett* v. *Collins*, [1998] EWCA Civ 884, [1998] 2 Lloyd's LR 255. See also Verbruggen, Van Ho & Terwindt, and Glinski & Rott in this issue.

64 N. Lagoni, *Classification Societies*, pp 237–238.

65 Reglement onderzoek schepen op de Rijn 1995, BWBR0025973, CEND/HDJZ-2009/105sectorSCH.

66 Hoge Raad der Nederlanden, no. C02/310HR, 7 May 2004, *Nederlandse Jurisprudentie* 2006, p 281, uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2004:AO6012.

67 Hoge Raad der Nederlanden, 7 May 2004, *supra* n. 66, paras 3.3.2.–3.4.5.

legal norm (*ontstaansrelativiteit*).[68] In sum, the requirement of relativity implies that a third party who suffered economic loss has to prove that the legal norm which has been violated by the certifier grants protection against the suffered loss. Recovery will only be possible if a third party's interest is protected by the violated norm and if the type of the loss and the way it occurred fall within the protective scope of the norm.[69]

20. The *Hoge Raad* eventually held that a classification society needs to carefully perform the surveys and certification of the vessel. This obligation extends towards both the shipowner and the flag State.[70] The inspection of vessels by the RO and subsequent issuance of the certificate pursuant to the ROSR contributes to the public welfare. It enhances safety of life at sea by preventing accidents. The provisions included in the ROSR and the inspection of vessels do not cover the protection of the plaintiff's individual economic losses resulting from a negligent survey and certification. The *Hoge Raad* ruled that the RO could not be held liable for the loss caused by the sinking of a vessel.[71]

3.2. Immunity from Jurisdiction

21. Classification societies act on behalf of flag States in their public role. It is, therefore, interesting to examine the application of immunity from jurisdiction under international law, also known as sovereign or State immunity. Once the notion of sovereign immunity has been discussed (part 3.2.1.), its application in the context of classification societies is examined more thoroughly (part 3.2.2.).

3.2.1. Immunity from Jurisdiction Under International Law

22. Sovereign immunity is a principle of customary international law whereby a State is immune from the adjudicative jurisdiction of another State.[72] This

68 R. Meijer, 'Het relativiteitsvereiste: terug van nooit weggeweest Over relativiteit in het algemeen en bij vernietigde overheidsbesluiten in het bijzonder', 2. *MvV (Maandblad voor Vermogensrecht)* 2008, pp 22-23; S. Lindenbergh, 'Alles is betrekkelijk. Over de relatie tussen normschending en sanctie in het aansprakelijkheidsrecht', 15 December 2006, Erasmus Universiteit Rotterdam, Rotterdam Institute of Private Law, repub.eur.nl/pub/8423; G.E. Van Maanen, 'De relativiteit als onlosmakelijk bestanddeel van de onrechtmatigheidsvraag', in J. Ten Kate (ed.), *Miscellanea, Jurisconsulto vero Dedicata, Bundel opstellen aangeboden aan prof. mr J.M. van Dunné* (Deventer: Kluwer 1997), pp 258-259.

69 A. Hartkamp & C. Sieburgh, *Verbintenissenrecht. De verbintenis uit de wet* (Deventer: Kluwer 2011), pp 128-130; C. Van Dam, 'Aansprakelijkheid van Toezichthouders. Een analyse van de aansprakelijkheidsrisico's voor toezichthouders wegens inadequaat handhavingstoezicht en enige aanbevelingen voor toekomstig beleid', British Institute of International and Comparative Law, 2006, pp 124-125.

70 Hoge Raad der Nederlanden, May 7, 2004, *supra* n. 66, para. 3.3.2.

71 Hoge Raad der Nederlanden, 7 May 2004, *supra* n. 66, paras 3.3.2.-3.4.5.

72 B.A. Boczek, *International Law: A Dictionary* (Oxford: Scarecrow Press 2005), p 125.

immunity exempts States from prosecution or a suit for the violation of the domestic laws of another State in that State. A successful plea of immunity prevents a State from being made a party to proceedings in the courts of a foreign State. Immunity from jurisdiction includes proceedings against the State, its organs or enterprises and its agents.[73]

23. Immunity from jurisdiction has a national as well as an international dimension. The European Convention on State Immunity (ECSI)[74] and the UN Convention on Jurisdictional Immunities of States (UNCJIS)[75] are adopted at the international level. Whereas only eight countries have ratified the ECSI since 1972, the UNCJIS has not been ratified by sufficient States to become effective.[76] As these instruments are not yet fully enforceable or effective,[77] countries enacted additional legislation dealing with State immunity (e.g. the US Foreign Sovereign Immunity Act[78] and the UK State Immunity Act[79]). In other countries such as Belgium, immunity from jurisdiction has been developed by courts,[80] thereby taking into account Article 6 of the European Convention on Human Rights (right to a fair trial).[81]

---

73 D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment 2010/02, OECD Publishing, 2010, p 10, www.oecd.org/corporate/mne/WP-2010_2.pdf; J. Finke, 'Sovereign Immunity: Rule, Comity or Something Else?', 21. *EJIL (European Journal of International Law)* 2010, p 853.

74 European Convention on State Immunity of May 16, 1972, ETS No.074, rm.coe.int/16800730b1.

75 United Nations, United Nations Convention on Jurisdictional Immunities of States and Their Property, December 2, 2004, A/RES/59/38, treaties.un.org/doc/source/recenttexts/english_3_13.pdf.

76 J. Finke, 21. *EJIL* 2010 2010, p 857.

77 See in this regard: F. Siccardi, 'Immunity from jurisdiction are CS entitled to it (a) as Recognized Organizations acting for flag states (b) when performing class services', in London Shipping Law Center, *Classification Societies Regulatory Regime and Current issues on Liability*, 21 February 2013, p 44, www.shippinglbc.com/content/uploads/members_documents/Webfile_-_Classification_Societies.pdf.

78 US Foreign Sovereign Immunities Act 1976, 28 U.S.C. ss 1602–1611.

79 UK State Immunity Act (1978), I.L.M. 1978, pp 1123–1129.

80 See for an overview with further references to case law: J. Wouters & M. Vidal, 'De rechter als hoeder van het internationaal recht: recente toepassingen van internationaal recht voor Belgische hoven en rechtbanken', in VRG Alumni, *Recht in beweging. 13de VRG-Alumnidag 2006* (Antwerp: Maklu 2006), pp 232–233.

81 The Dutch *Hoge Raad* already had to assess the relationship between immunity from jurisdiction and access to its domestic courts as guaranteed by Art. 6 of the European Convention on Human Rights. See for example: Hoge Raad der Nederlanden, no. 07/13385, 11 September 2009, *Nederlandse Jurisprudentie* 2010, p 523, uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BI6317.

24. Many jurisdictions (e.g. Belgium,[82] the US and the United Kingdom[83]) have evolved from a rule of absolute immunity towards one of restrictive immunity. Under the restrictive theory of immunity, a State is only immune from the jurisdiction of foreign courts with regard to its sovereign or public acts (*jure imperii*). Immunity does not apply for acts that have a private or commercial character (*jure gestionis*).[84] A foreign State engages in commercial activities for purposes of the restrictive theory only where it acts in a manner of a private player within the market. States enjoy immunity as long as they act in their official capacity but must submit to the jurisdiction of another State if they act as a private person.[85]

25. It should be stressed that a State of course remains subject to the jurisdiction of its own courts.[86] Moreover, there are different situations in which a State will not benefit from sovereign immunity. First, several countries such as the US[87] and the UK[88] as well as the international community by virtue of Article 11 ECSI and Article 12 UNCJIS adopted a (non-commercial) tort law exception. This exception basically implies that a foreign State may be held liable for certain torts committed in another country or for torts having an effect in that country (e.g. death or personal injury).[89] Second, national

---

82 Court of Cassation, June 11, 1903, *Pas. (Pasicrisie belge)* 1903, I, p 301; Court of Appeal Brussels, 16 March 1989, *JT* (*Journal des Tribunaux)* 1989, p 550; Court of First Instance Brussels, 6 June 2000 (unpublished) as reported in J. Wouters, *Bronnenboek Internationaal Recht* (Antwerp: Intersentia 2000), p 136.

83 A. Orakhelashvili, *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar Publishing 2015), pp 159–160.

84 E. Taslim, *The International Court of Justice and Some Contemporary Problems: Essays on International Law* (The Hague: Springer 2013), p 132; R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal and International Human Rights Law* (Leiden: E. M. Meijers Instituut 2008), pp 12–64. The first paragraph of Art. 10 UNCJIS, for instance, stipulates that if a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

85 *Saudi Arabia* v. *Nelson*, 507 US 349, pp 359–360 (1993); X. Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press 2012), pp 95–96. See in this regard also Art. 2.2 UNCJIS.

86 F. Siccardi, *Classification Societies Regulatory Regime and Current issues on Liability*, pp 48–49.

87 S. 1605(a)(5) of the Foreign Sovereign Immunities Act. See C. Bradley, *International Law in the U. S. Legal System* (New York: Oxford University Press 2013), pp 243–244.

88 See for example s. 5 of the State Immunity Act 1978 stipulating that a state is not immune in proceedings in respect of (1) death or personal injury; or (2) damage to or loss of tangible property caused by an act or omission in the United Kingdom.

89 S. Havkin, 'The Foreign Sovereign Immunities Act: The Relationship between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central de Nicaragua', 10. *Hastings Int'l & Comp. L. Rev. (Hastings International and Comparative Law Review)* 1987, p (455) at 456.

legislation[90] and international conventions[91] sometimes stipulate that immunity might be waived (e.g. because the State consented to the exercise of jurisdiction).[92] Finally, a State may lose its right on immunity by participating in or initiating the proceedings before a foreign court.[93]

3.2.2. Immunity from Jurisdiction and Classification Societies

26. Even if national administrations delegate certification duties to ROs, flag States remain responsible to guarantee the completeness and efficiency of the inspection and survey of their vessels.[94] Flag States have to take all steps to ensure that, from the point of view of safety, a vessel is fit for the service for which it is intended.[95] They have to take the necessary measures with regard to the construction, equipment and seaworthiness of ships flying their flag to ensure safety at sea.[96] Certificates issued under the authority of national governments need to be accepted by other States for all purposes covered by the Convention. They have to be regarded by other States as having the same force as their own certificates.[97] The Model Agreement for the Authorization of ROs specifies that an RO, its officers, employees or any other person acting on its behalf are entitled to all the protection of law and the same defences and/or counterclaims as would be available to the delegating State if the latter had done the statutory certification.[98]

27. It is against this background no surprise that ROs have already invoked sovereign immunity when claims have been filed against them. One of the oldest cases accepting immunity from jurisdiction was *Sundancer* v. *ABS*. Classification society ABS issued a class certificate (private role) and a number of statutory certificates on behalf of the Bahamian Government (public role). The shipowner argued that the vessel would not have sunk but for the classification society's negligence, negligent misrepresentation and breach of contract. However, the District Court for the Southern District of New York held that Bahamian law – the

90 See for example s. 1605(a)(1) of the Foreign Sovereign Immunities Act, 28 U.S.C. s. 1605; S. 2 (1) of the State Immunity Act 1978.

91 See for example Art. 7 UNCJIS and Art. 2 ECSI.

92 F. Siccardi, *Classification Societies Regulatory Regime and Current issues on Liability*, p 49.

93 See for example Art. 3 ECSI and Art. 8 UNCJIS.

94 Part B, Regulation 6 (Inspection and Survey) SOLAS, 1 November 1974.

95 Art. I (b) SOLAS, 1 November 1974.

96 Art. 94(3)(a) United Nations Convention on the Law of the Sea 1982, 10 December 1982, 1833 UNTS 3.

97 Part B, Regulation 17 (Inspection and Survey) SOLAS, 1 November 1974; Art. 2.3. Model Agreement for the Authorization of Recognized Organizations Acting on Behalf of the Administration, MSC/Circ.710 -MEPC/Circ.307.

98 Art. 7.5. Model Agreement for the Authorization of Recognized Organizations Acting on Behalf of the Administration, MSC/Circ.710 -MEPC/Circ.307.

flag the *Sundancer* flew – shielded ABS with immunity for its actions in issuing the statutory certificates.[99] The Court of Appeals for the Second Circuit upheld the decision and granted ABS immunity from jurisdiction. A distinction was thereby made between private classification for which immunity does not apply and public certification allowing a society to enjoy immunity.[100]

28. More recent cases show that the distinction between private and public functions and its influence of immunity is not always straightforward. Although judges sometimes still deny immunity protection to commercially operated vessels,[101] two important decisions illustrate that this immunity might apply to private classification services as well, namely the case of the *Erika* and the case of the *Al-Salam Boccaccio 98*.

29. The sinking of the *Erika* caused a huge oil pollution of the French shoreline. Proceedings were instituted by the *Conseil Général de la Vendée* against the shipowners, the owners of the cargo (Total) and RINA. The *Erika* was classed by RINA, which renewed the class certificate in November 1999 (private function). RINA also acted as RO for Malta and issued an International Safety Certificate. As a consequence, RINA claimed that it could not be held liable by a French court as it benefited from sovereign immunity (public function).[102] After decisions by the *Tribunal Correctionnel*[103] and by the *Cour d'Appel*,[104] the case made it to the Criminal Section of the *Cour de Cassation*, which largely upheld the judgment by the Court of Appeal.[105]

30. The French Court of Cassation did not address whether a RO could benefit from flag State immunity because RINA renounced immunity by participating in the proceedings.[106] In first instance, the *Tribunal Correctionnel* rejected sovereign immunity because the inspections and certification of the vessel were performed in the interest of the shipowner. The court held that the existence of a link between public certification and private classification services, the relation of Flag State Malta with various classification companies or even the objective of public service that would be

99 *Sundance Cruises* v. *American Bureau of Shipping*, 799 F. Supp. 363, pp 386–393 (S.D.N.Y. 1992).

100 *Sundance Cruises* v. *American Bureau of Shipping*, 7 F.3d 1077, paras 34–48 (2nd Cir.1993).

101 See for example Court of Appeal Bordeaux, 6 March 2017, no. 14/02185, p 8, www.iopcfunds.org/uploads/tx_iopcincidents/ Arret_de_la_cour_d_appel_de_Bordeaux_-_mars_2017.pdf.

102 V.J. Foley & C.R. Nolan, 'The Erika Judgment-Environmental Liability and Places of Refuge: a Sea Change in Civil and Criminal Responsibility that the Maritime Community must Heed', 33. *Tul. Mar. L.J.* 2008, p (41) at 44; O.Z. Özcayir, 'The Erika and its Aftermath', 7. *Int. M. L.* (*International Maritime Law)* 2000, p 230.

103 High Court of Paris, 16 January 2008, no. 9934895010, JurisData no. 2008-351025, *RDT (Revue de Droit des Transports)* 2008, p 36. The decision can be found online on Dalloz.

104 Court of Appeal Paris, 30 March 2010, no. 08/02278, actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/ MARS_2014/Erika_CA_Paris_30_mars_2010.pdf.

105 Court of Cassation, September 25, 2012, no. 10-82.938, JurisData no. 2012-021445. This decision can be found online on Legifrance as well as on Dalloz.

106 Court of Cassation, 25 September 2012.

pursued with the classification activities had neither the purpose, nor the effect of linking these activities to the exercise of sovereignty by the flag State. Although the court did not explicitly decide whether a classification society acting as RO could enjoy immunity (public function), it held that a society is not immune when acting on behalf of a shipowner to classify the latter's vessel (private function).[107]

31. The *Cour d'Appel* decided that the certificates issued by a classification society acting as RO were 'actes de puissances publiques'(*acta iure imperii*) and not simple 'actes de gestion' (*acta iure gestionis*). Statutory certificates are issued to enhance the safety at sea and serve the public interest. The *Erika* could not have sailed under Maltese Flag without RINA's certification services. Thus, a classification society acting as RO should be able to rely on sovereign immunity. The court even seems to accept that a society can enjoy immunity from jurisdiction when providing private certification services to the shipowner. The (technical) standards that have to be fulfilled before a society can issue a certificate are part of a set of class rules 'qui conditionnent la certification statutaire' by virtue of the reference made to them in several international maritime safety conventions. Class rules aim to improve the safety at sea and serve the public interest.[108] However, the Court of Appeal, relying on Article 8 UNCJSI, [109] decided that RINA had renounced the privilege of immunity by participating in the proceedings.[110]

32. A second decision that sheds light on the immunity of societies when acting as ROs is the case of the *Al-Salam Boccaccio 98.* The vessel sank in the Red Sea after a fire broke out on the car deck. Classification society RINA was acting as RO on behalf of the Panama Maritime Administration (public role) and provided classification services for the shipowners as well (private role).[111]

33. The Association of Victim's Families filed a suit against RINA before the *Tribunale* of Genova. The Association claimed compensation of USD 132,000,000 from RINA. The plaintiffs argued that the classification society

107 High Court of Paris, 16 January 2008, p 276.

108 Court of Appeal Paris, 30 March 2010, pp 322-323.

109 According to the first paragraph of that Article, a State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has: (1) itself instituted the proceeding; or (2) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment. The second paragraph further stipulates that a State is not considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of: (1) invoking immunity; or (2) asserting a right or interest in property at issue in the proceeding. Art. 3 of the European Convention on State Immunity contains similar provisions.

110 Court of Appeal Paris, 30 March 2010, pp 323-324.

111 See for a discussion of the facts: X, 'Class on trial', 375. *Fairplay* 2012, p 26.

had been negligent during the ship inspections because several technical safety class rules were not respected. As a consequence, RINA was not allowed to issue the certificate of class. RINA would have withdrawn the vessel's class if it had respected the International Safety Management Code and several other compliance documents.[112] RINA contested these allegations and argued that it should be granted immunity as it acted as an RO.[113]

34. The *Tribunale* accepted RINA's immunity from Italian adjudicative jurisdiction. The court relied on several precedents (among which the *Erika* judgment) to conclude that private companies do enjoy immunity from jurisdiction insofar as they perform public activities and duties delegated by flag States. The court also held that the distinction between (private) classification and (public) statutory services was arbitrary and irrelevant for the purpose of granting immunity because class certificates are required for each vessel to sail.[114] RINA's activities were not merely technical. The issuance of certificates is a distinguished public feature of flag States as certificates – also when issued by ROs – are valid *erga omnes.* Such certificates are recognized and accepted by all States by virtue of Regulation 17 in the SOLAS Convention.[115]

3.3. Conflicts of Interest and the Role of Tort Law

35. Without going into detail on this issue,[116] classification societies can face a conflict of interest. The shipowner engages a society for the classification of vessels

---

112 The purpose of this Code is to provide an international standard for the safe management and operation of ships as well as for pollution prevention. The Code establishes safety-management objectives and requires a safety management system to be established by the shipowner and other parties that have assumed responsibility for operating the ship (International Maritime Organization, 'ISM Code and Guidelines on Implementation of the ISM Code', www.imo.org/en/OurWork/humanelement/safetymanagement/pages/ismcode.aspx).

113 M. Ferrero, 'Press Conference on Al Salam Boccaccio 98 shipwreck', *Ufficio Stampa & Communicazione*, 20 July 2010.

114 *Abdel Naby Hussein Maboruk Aly c. RINA s.p.a.*, Court of First Instance Genova, 8 March 2012, no. 9477/2010, *Il Diritto Marittimo* 2013, p 145 as discussed in F. Siccardi, *Classification Societies Regulatory Regime and Current issues on Liability*, pp 64–66; A. Moizo, 'RINA will be tried in Panama for the Boccaccio', *Ship2shore*, 2 July 2012, www.ship2shore.it/en/shipping/rina-will-be-tried-in-panama-for-the-boccaccio_47484.htm.

115 Regulation 17 stipulates that '[c]ertificates issued under the authority of a Contracting Government shall be accepted by the other Contracting Governments for all purposes covered by the present Convention. They shall be regarded by the other Contracting Governments as having the same force as certificates issued by them'; *Abdel Naby Hussein Maboruk Aly c. RINA s.p.a.*, 8 March 2012 as discussed in F. Siccardi, *Classification Societies Regulatory Regime and Current issues on Liability*, p 65.

116 See in this regard: M. Kruithof, 'Wanneer vormen tegenstrijdige belangen een belangenconflict?', in C. Van der Elst, H. De Wulf, R. Steennot & M. Tison (eds), *Van alle markten: liber amicorum Eddy Wymeersch* (Antwerp: Intersentia 2008), pp 590–591 & pp 595–596, nos. 20 & 25–26; M. Kruithof, 'Conflicts of Interest in Institutional Asset Management: Is the EU Regulatory Approach

(private role). In the exercise of their private role, classification societies are confronted with the situation wherein the entity being examined and certified (the shipowner and more specifically the latter's vessels) pays for the certification. A classification society gives an independent assessment of a vessel, while it is at the same time economically dependent upon the shipowner's fleet. It is not illusionary that a shipowner who is dissatisfied with a classification society will class hop to another one offering less rigorous terms and/or cheaper services. This could result in a less strict application of (technical standards in) class rules.[117]

36. The dual role of classification societies carrying out public functions on the basis of a private contract further contributes to the identified conflict of interest. This especially is the case when the shipowner has a large fleet and/or the classification society is economically dependent upon the shipowner. A shipowner will in this situation incur additional costs if a society recommends improvements regarding the vessel's safety (public role). This might tempt the shipowner to employ another classification society that does not ask for such improvements or which lowers its safety standards. Such commercial pressure is not only to the detriment of safe shipping but undermines the classification society's public role as well.[118] Flag States also have a commercial interest in the work of ROs. Statutory certificates give flag States the economic benefits of maintaining the vessel in their national registry.[119] In the process of 'selling safety to someone else and competing for clients at the same time',[120] a classification society ultimately needs 'to find a reasonable balance between the benefits of safety standards and the costs which such safety incurs'.[121]

Adequate?', in L. Thévenoz & R. Bahar (eds), *Conflicts of Interest: Corporate Governance and Financial Markets* (Alphen aan den Rijn: Kluwer Law International 2007), pp 278–280; J. De Bruyne & C. Vanleenhove, 20. *JIML* 2014, p 103; J. De Bruyne, *Third-Party Certifiers*, pp 219–237. See in this regard also the contributions by professors Timothy D. Lytton, Carolijn Terwind and Peter Rott in this special issue.

117 J.L. Pulido Begines, 36. *J. Mar. L. & Com.* 2005, p 493; N. Lagoni, *Classification Societies*, pp 26–27; P. Boisson, 'Classification Societies and Safety at Sea: Back to Basics to Prepare For the Future', 18. *Mar. Pol. (Maritime Policy)* 1994, p (363) at 373.

118 N. Lagoni, *Classification Societies*, pp 26–35; S. Durr, 'An Analysis of the Potential Liability of Classification Societies: Developing Role, Current Disorder & Future Prospects', Shipping Law Unit University of Cape town, Research and Publications, para. 2.3.1; M. Hayashi, 'Toward the Elimination of Substandard Shipping: The Report of the International Commission on Shipping', 16. *Int'l J. Marine & Coastal L. (International Journal of Marine & Coastal Law)* 2003, p (501) at 508.

119 S.A. Lentz & F. Felleman, 'Oil Spill Prevention: A Proactive Approach', 1. *International Oil Spill Conference* 2003, p (3) at 13.

120 N. Lagoni, *Classification Societies*, p 29.

121 N. Lagoni, *Classification Societies*, p 30.

37. Conflicts of interest are often portrayed as a cause for poor performances of classification societies and other certifiers.[122] The mere existence of this conflict of interest, however, does not necessarily affect the reliability and accuracy of class certificates. There are studies showing that the conflict of interest caused by the 'issuer-pays business model' in the context of credit rating agencies (a third-party certifier in the financial sector) does by itself not lead to flawed credit ratings.[123] Even if a conflict of interest exists between a classification society and a shipowner, the market structure might prevent that it has detrimental consequences on the accuracy and reliability of class certificates. This especially seems to be the case for the major classification societies. Their revenues are enormous making it difficult for one particular client shipowner to have a considerable influence on the working of classification societies.[124] Classification societies also derive part of their revenue from other activities than certification services (e.g. consultancy).[125] Moreover, certification services of classification societies are often not restricted to only one sector but include several other industries as well.[126] As reducing the existing conflict of interest does not necessarily increase the accuracy and reliability of class certificates, the need for a proper risk of civil liability for classification societies becomes even more apparent.

38. Case law in the context of credit rating agencies is particularly interesting in this regard. The court in *Abu Dhabi* v. *Morgan Stanley,* for instance, concluded that there 'is no question that companies can conduct business legally, even in the face of conflicts of interest, provided that proper

122 See for example L. Bai, 'On Regulating Conflict of Interests in the Credit Rating Industry', 13. *N.Y. U. J. Legis. & Pub. Pol'y* (*New York University Journal of Legislation and Public Policy)* 2010, p 253 (for credit rating agencies); T.D. Lytton & L.K. McAllister, 'Oversight in Private Food Safety Auditing: Addressing Auditor Conflict of Interest', 2. *Wis. L. Rev. (Wisconsin Law Review)* 2014, p 289 (for food safety auditors). See however J. De Bruyne, *Third-Party Certifiers*, pp 224-227 & pp 236-237.

123 See for example D.M. Covitz & P. Harrison, 'Testing Conflicts of Interest at Bond Ratings Agencies with Market Anticipation: Evidence that Reputation Incentives Dominate', December 2003, www.federalreserve.gov/pubs/feds/2003/200368/200368pap.pdf.

124 With 400.000 clients worldwide, Bureau Veritas's revenue was EUR 4.55 billion in 2016, while its operating profit was estimated at EUR 609.7 million (see finance.bureauveritas.com/phoenix.zhtml?c=216209&p=irolfundamentals). Despite its charitable non-profit making status, Lloyd's Register's total turn-over in 2016 was GBP 881 million (EUR 1 billion), while its normalized operating profit was GBP 79 million (EUR 90.64 million) (see Lloyd's Register, 'Group Review 2016: Shaping the future, delivering solutions today', Group Review 2016, p 28). DNV GL had a revenue of 20.834 million NOK (EUR 2.16 billion) and an operating profit of 154 million NOK (EUR 15.98 million) in 2016 (see www.dnvgl.com/about/in-brief/key-figures.html).

125 Classification society Lloyd's Register, for instance, provides consulting services in the field of energy and engineering

126 For example, Bureau Veritas does not only act as classification society but also provides certification services in other industries such as construction and real estate

safeguards are in place'.[127] Arguably, one could say that an appropriate risk of civil liability for ROs could be such a safeguard. Yet, the analysis in the previous parts showed that classification societies in their public role do not always face such a risk of liability. Increasing the risk of tort liability for ROs might thus be necessary as it can operate as a proper safeguard to ensure that they provide accurate and reliable certification services, despite the existence of the conflict of interest.[128]

4. Conclusion: Tort Law and the Dual Role of Classification Societies

39. The article examined to which extent the dual role of classification societies could undermine the deterring effect of tort law on their conduct. To find an answer to that question, I focussed on three different elements, namely case law dealing with the liability of ROs, immunity from jurisdiction and the existence/influence of conflicts of interest. Based on an analysis of these elements, it can indeed be concluded that a classification society's dual role undermines the deterrent effect of tort law. To restore this effect and hence increase the accuracy and reliability of class certificates, policymakers have two options. In the long term, the dual role of classification societies need to be reconsidered. Several suggestions have already been made in this regard. Flag States, for instance, could be required to pay the RO, or classification societies might be urged to choose between their public or private function. One could also entirely re-organize the classification process of vessels.[129] In the short term, policymakers could take measures to increase the risk of civil liability faced by ROs. Working with a reversal of the burden of proof regarding their negligence,[130] legally restricting reliance on sovereign immunity or providing additional peer review mechanisms on their working might be viable options in this regard.[131]

---

127 *Abu Dhabi Commercial Bank* v. *Morgan Stanley & Co.*, 651 F. Supp. 2d 155, pp 178–179 (S.D.N. Y. 2009).

128 See in this regard also: J. De Bruyne, *Third-Party Certifiers*, pp 219–237.

129 See for an overview and discussion: N. Lagoni, *Classification Societies*, pp 28–29; L. Lindfelt, 'A future for classification societies', in CMI, *CMI Yearbook 1994* (Antwerp: CMI Headquarters 1994), pp 253–254. The Carver Report drafted by the House of Lords in February 1992 recommended an overall approach to safety. The different roles of institutions in the maritime sectors led to inconsistencies, gaps and duplications of effort in implementing safety standards. The overall approach to safety could be achieved by extending the concept of classification to statutory services. A vessel would thus only be classed if it complies with both (private) classification standards and (public) safety requirements (this has been reported in: P. Boisson, 18. *Mar. Pol.* 1994, p 373).

130 N. Lagoni, *Classification Societies*, p 322.

131 See in this regard: J. De Bruyne, *Third-Party Certifiers*, pp 267–381 with further references.